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January 20, 2005

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: CC Docket No. 01-92 (Wireless Termination Service Tariffs)
Missouri Small ILEC Written *Ex Parte* Communication**

Dear Ms. Dortch:

According to recent news reports, the Federal Communications Commission ("FCC") may be taking up for consideration a petition filed by T-Mobile USA ("T-Mobile") challenging the lawfulness of wireless termination service tariffs filed by small rural incumbent local exchange carriers (ILECs). The Missouri Small Telephone Company Group ("STCG") and the Missouri Independent Telephone Company Group ("MITG") (collectively "the Missouri Small ILECs" or "Small ILECs")¹ have filed prior written comments and ex parte letters with the FCC in opposition to T-Mobile's petition, and representatives from the Missouri Small ILECs met with FCC staff last July to discuss the issue. Because wireless termination tariffs are of such great importance, the Missouri Small ILECs will offer brief summary comments in opposition to T-Mobile's petition.

Also, the Missouri Small ILECs will offer four additional points that should be addressed in any order that is issued in response to T-Mobile's petition. First, any FCC decision on wireless tariffs should have prospective effect only. Second, the FCC should mandate that wireless carriers must negotiate agreements with small rural ILECs before they begin sending traffic to those ILECs. Third, the FCC should clarify that if the wireless carriers do not live up to their responsibilities to negotiate agreements, then small rural ILECs may compel negotiations and, if necessary, arbitration before state commissions pursuant to the federal Telecommunications Act of 1996 (the Act). Fourth, the FCC should

¹ The member companies of the Missouri STCG and the MITG are listed in Attachment A.

ensure that any decision issued in this case does not prohibit state commissions from awarding compensation for wireless traffic terminated to small rural exchanges prior to the effective date of an approved compensation or interconnection agreement. These four points will ensure that small rural carriers are fairly compensated for the use of their network facilities and services.

I. SUMMARY COMMENTS

A. Background History

Until February of 1998, Southwestern Bell Telephone Company (SWB) was responsible for compensating the Missouri Small ILECs for all wireless traffic SWB delivered to the Small ILEC exchanges for termination. Accordingly, the Small ILECs billed SWB for this traffic under their access tariffs. The Missouri Public Service Commission (Missouri PSC) subsequently relieved SWB from this obligation, but the Missouri PSC specifically ordered that wireless carriers were not to send traffic over the SWB facilities until they had agreements with the Small ILECs.² Unfortunately, the wireless companies did not enter into such agreements. Instead, wireless carriers sent traffic to small rural exchanges without an agreement and without paying for it. Carriers such as T-Mobile used the indirect interconnections with the small companies to ignore the Missouri PSC's express requirement that wireless carriers negotiate agreements. By doing so, T-Mobile has sidestepped the Act's preference for negotiated compensation and interconnection agreements.

B. The Missouri Wireless Termination Service Tariffs

In order to put an end to the unauthorized and unlawful use of the Small ILECs' facilities, the Missouri PSC approved the wireless termination service tariffs. The Missouri tariffs establish the rates, terms, and conditions for wireless traffic that is delivered in the absence of an agreement, and the tariffs expressly state that they will be superceded by an approved compensation or interconnection agreement.³ Thus, the tariffs are expressly subordinate to approved agreements, and the tariffs only apply in situations where a wireless carrier is using the small companies' facilities in the absence of an agreement.

² *In the Matter of Southwestern Bell Telephone Company*, MoPSC Case No. TT-97-524, *Report and Order*, issued December 23, 1997. The MoPSC stated: "Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement with such Other Telecommunication Carriers to directly compensate that carrier for the termination of such traffic."

³ The tariff language provides:

This tariff applies except as otherwise provided in 1) an interconnection agreement between a [wireless] provider and the Telephone Company approved by the Commission pursuant to the Act; or 2) a terminating traffic agreement between the [wireless] provider and the Telephone Company approved by the Commission.

As a matter of law, the Act provides all wireless carriers (including T-Mobile) with a clear procedure to request an agreement with small rural companies. Since they were approved, the Missouri Small ILEC wireless termination tariffs have not prevented any wireless carrier from negotiating an agreement. Indeed, all of Missouri's major wireless carriers have been able to come to the table and reach negotiated agreements with small companies. Specifically, Verizon Wireless, Cingular, Sprint PCS, ALLTEL Wireless, and even T-Mobile have negotiated agreements after the tariffs were approved.⁴

C. The Missouri Wireless Tariffs Are Lawful And Consistent With The Act.

Wireless termination tariffs are neither unlawful nor unreasonable; rather, they were necessary in Missouri to ensure that the Small ILECs are compensated for the use of their facilities and services. The Small ILECs have a constitutional right to payment for the use of their networks, and the Missouri PSC did not allow the wireless calls to continue terminating for free because this would have been confiscatory.⁵ In Missouri, the wireless tariffs led to negotiated agreements because they provided an appropriate incentive for wireless carriers to pursue the negotiations envisioned by the Act and required by the Missouri PSC.

In the *Sprint Spectrum* case affirming the Missouri wireless tariffs, the Missouri Court of Appeals recognized that the wireless carriers were using the small companies' facilities without payment and concluded that the tariffs were not preempted by the Act:

The rural carriers have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. **The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction.** The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.⁶

Sprint Spectrum correctly held that the wireless tariffs are not preempted by the Act.

In *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Svcs, Inc.*,⁷ the Sixth Circuit explained:

When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission

⁴ See e.g. MoPSC Case Nos. IO-2003-0207 (Verizon Wireless); TK-2003-0533 (Sprint PCS); TO-2004-0445 (Cingular); TO-2002-0147 (ALLTEL Wireless); TK-2004-0165 (T-Mobile).

⁵ *Sprint Spectrum v. Missouri PSC*, 112 S.W.2d 20, 26 (citing *Smith et al. v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591-92, 70 L.Ed. 747, 46 S.Ct. 408 (1946)).

⁶ *Sprint Spectrum v. Missouri PSC*, 112 S.W.2d 20 at 25. (Internal citations omitted and emphasis added.)

⁷ 323 F.3d 348 (6th Cir. 2003).

regulations “if such regulations are not inconsistent with the provisions of [the Act].”⁸

The Sixth Circuit held, “According to the Federal Communications Commission, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.”⁹ The Missouri Small ILEC wireless tariffs meet this test because they do not prevent T-Mobile from taking advantage of Sections 251 and 252 of the Act.¹⁰

Other state commissions have also found that wireless termination service tariffs are lawful and reasonable. For example, the Alabama Commission found that it had “an obligation to preclude the Wireless Carriers from continuing to terminate the bulk of their indirect traffic on the networks of the Rural LECs without payment while the Wireless Carriers mull their decision of whether to invoke the Telecom Act’s provisions.”¹¹ The Alabama Commission concluded that strict enforcement of tariffs with respect to indirect wireless traffic would ensure that the rural LECs receive compensation for the use of their networks until such time as the wireless carriers employ the provisions in the Act for negotiated agreements.¹²

The Minnesota Public Utilities Commission observed, “The fact that many wireless carriers have chosen to cooperate in arranging mutual compensation is not proof that all carriers will do so. And if a carrier does not do so, then a tariff provides an appropriate mechanism for securing compensation.”¹³

If T-Mobile dislikes the wireless tariffs, then the Act provides T-Mobile with a mechanism to obtain reciprocal compensation agreements to establish terms, conditions, and rates for the exchange of local traffic. Specifically, the Act requires incumbent LECs to negotiate and, if necessary, arbitrate such agreements with requesting carriers.¹⁴ In fact, this is exactly what the vast majority of the wireless carriers have done with the large ILECs in Missouri, and many wireless carriers (including T-Mobile) have now established agreements with Missouri’s small companies as well. The Small ILECs recognize their duties and responsibilities to negotiate and arbitrate reciprocal compensation arrangements with wireless carriers, and they have met those responsibilities.

⁸ *Id.* at 358.

⁹ *Id.* at 359.

¹⁰ Indeed, T-Mobile has subsequently negotiated agreements with three small Missouri companies after the wireless tariffs were approved. These three agreements were approved by the Missouri PSC. See e.g. *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.

¹¹ *Petition for Declaratory Ruling by Alabama’s Rural Incumbent Local Exchange Carriers*, Docket 28988, 2004 Ala. PUC LEXIS 27, 232 P.U.R.4th 148, *Declaratory Order*, issued Jan 26, 2004, *54.

¹² *Id.*

¹³ *In the Matter of Wireless Termination Tariff*, Docket No. P-551/M-03-811, 2003 Minn. PUC LEXIS 133, *Order Requiring Revised Filing*, Nov. 18, 2003, *13.

¹⁴ See 47 U.S.C. §§ 251 and 252.

II. ADDITIONAL COMMENTS

As explained above, the proper course of action is to dismiss T-Mobile's petition because wireless termination service tariffs do not conflict with the Act or otherwise prevent wireless carriers from establishing negotiated agreements. If the FCC does not dismiss T-Mobile's petition outright, then the Missouri Small ILECs believe that any FCC order addressing the legality of wireless termination service tariffs should address four important issues.

First, any FCC decision on wireless tariffs should only have prospective application in order to avoid state and federal prohibitions against retroactive ratemaking and unconstitutional takings. Second, the FCC should mandate that wireless carriers are required to negotiate agreements with small rural ILECs before they begin sending traffic to those ILECs. Third, the FCC should clarify that if the wireless carriers do not live up to their responsibilities to negotiate agreements, then small rural ILECs may compel negotiation and, if necessary, arbitration before state commissions pursuant to the Act. Fourth, the FCC should ensure that its decision does not prohibit state commissions from awarding compensation for wireless traffic terminated to small rural ILEC exchanges prior to the effective date of an approved agreement. These four points will ensure that small rural carriers are compensated for the use of their network facilities and services.

A. Prospective Application

Any order issued by the FCC in this matter should only have prospective application so as to avoid state and federal prohibitions against retroactive ratemaking and unconstitutional takings. For example, the FCC's *ISP Remand Order* clarified that it did not alter existing contractual obligations or preempt any state commission decision regarding compensation for ISP-bound traffic for the period of time prior to the effective date of the interim regime adopted in the *Remand Order*.¹⁵ In other words, the ruling was to have prospective effect only.¹⁶ Likewise, any order in this case that calls into question the legality of the wireless tariffs should have prospective effect only.

Prospective application is necessary to avoid unconstitutional confiscation or takings of the Small ILECs' facilities and services. Both the Missouri and federal Constitutions prohibit the confiscation of a public utility's property by depriving the utility from receiving reasonable compensation for the use of its facilities and services. The Supreme Court has explained, "If the rate does not afford sufficient compensation, the state has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."¹⁷ For example, the Alabama Public Service Commission recognized that it has "a legal responsibility to ensure that the facilities in which utilities have invested are not

¹⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98; CC Docket No. 99-68; 16 FCC Rcd 9151, *Order on Remand and Report and Order*, rel. April 27, 2001, ¶182.

¹⁶ See *Michigan Bell Tel. Co. v. MFS Intelenet*, 339 F.3d 428,435 (6th Cir. 2003)(The FCC "did provide that its ruling in the remand order was to have prospective effect only.")

¹⁷ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

utilized in a manner that is confiscatory to the utility in question.”¹⁸ Therefore, the FCC cannot disturb the compensation received to date by the Small ILECs under their approved wireless tariffs because this would be clearly confiscatory.

Prospective application is also consistent with the bar against retroactive ratemaking. Under the retroactive ratemaking doctrine, lawfully established rates remain in force until altered by a subsequently lawful rate. Neither the Missouri PSC nor the FCC can order the Small ILECs to make reparations for charging a rate that has been explicitly approved by a state commission and upheld by the courts at the time it was collected. The FCC “has no power to alter a rate retroactively.”¹⁹ Therefore, any FCC order should have prospective effect only.

Finally, prospective application makes sense from a practical standpoint because wireless tariffs have been in place for a number of years in various states. Dozens of small rural ILECs have collected millions of dollars from various wireless carriers under such tariffs, and it would be impractical and unlawful to upset these arrangements retroactively. Prospective application would also minimize controversies over recovery of lost revenues that would certainly arise if the compensation previously paid under state tariffs is disturbed.

B. Wireless Carriers Must Negotiate Agreements Before Sending Traffic.

Many wireless carriers have negotiated agreements in Missouri, but the agreements were only negotiated after the wireless tariffs were approved. One wireless carrier – T-Mobile – still refuses to negotiate or pay the tariff rates. As long as T-Mobile can receive a free ride on small rural ILEC networks, it will have no incentive to enter into an agreement with the small companies. Therefore, the FCC should require wireless carriers to negotiate with small ILECs before sending traffic over indirect interconnections. Otherwise, some wireless carriers will continue using facilities without payment or permission.

C. The FCC Should Clarify that Small ILECs May Compel Negotiation And Arbitration.

Although there is no question that wireless carriers such as T-Mobile have always had the right to compel negotiations, the rights of rural ILECs to compel negotiations are not entirely clear. Some state commissions and courts have stated that small rural ILECs cannot unilaterally invoke the negotiation and arbitration provisions in the Act.²⁰ Therefore, the FCC should clarify that small rural ILECs have the right to compel negotiation and arbitration under the Act if a wireless carrier is sending traffic in the absence of a compensation or interconnection agreement.

¹⁸ *Petition for Declaratory Ruling by Alabama’s Rural Incumbent Local Exchange Carriers*, Docket 28988, 2004 Ala. PUC LEXIS 27, 232 P.U.R.4th 148, *Declaratory Order*, issued Jan 26, 2004 (Citations omitted.)

¹⁹ *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (6th Cir. 1992).

²⁰ See e.g. *Sprint Spectrum v. Missouri Public Serv. Comm’n*, 112 S.W.2d 20, 25 (Mo. App. 2003) (“The Act does not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with local exchange carriers.”)

D. Compensation For Traffic Terminated Prior To An Approved Agreement

The FCC should not preclude state utility commissions from awarding compensation for wireless traffic terminated prior to the effective date of an approved agreement, regardless of whether negotiations are initiated by the wireless carrier or by the small rural ILEC. Approval of an agreement operates prospectively and will not necessarily resolve issues associated with traffic terminated prior to the agreement's effective date. For example, some wireless carriers such as T-Mobile have terminated traffic to the small rural ILECs for seven years without payment. State commissions should be allowed to award the appropriate compensation, if any, for traffic terminated prior to an agreement. Any attempt to foreclose state commission discretion with respect to compensation for pre-agreement traffic could constitute unconstitutional takings of small rural ILEC property without compensation.

III. CONCLUSION

The Commission should deny T-Mobile's *Petition*. There is nothing unlawful about wireless termination tariffs that establish the rates, terms, and conditions for wireless-originated traffic that is delivered in the absence of an approved compensation or interconnection agreement. The Missouri wireless tariffs did not prevent any of Missouri's major wireless carriers from establishing agreements.

If the FCC does not dismiss T-Mobile's *Petition*, then the Missouri Small ILECs urge the FCC to address four points in any subsequent decision on the legality of wireless termination service tariffs. First, the decision should have prospective effect only. Second, wireless carriers must be required to negotiate agreements with small rural ILECs before they begin sending traffic to those ILECs over indirect connections. Third, the FCC should clarify that if the wireless carriers do not live up to their responsibilities to negotiate agreements, then small rural ILECs may compel negotiation and arbitration before state commissions pursuant to the Act. Fourth, the FCC should ensure that state commissions have authority to award compensation for wireless traffic terminated to small rural ILEC exchanges prior to the effective date of an approved agreement. These four safeguards will ensure that small rural companies are appropriately compensated for the use of their network facilities and services.

Respectfully submitted,

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ATTACHMENT A

Missouri Small Telephone Company Group

BPS Telephone Company
Cass County Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Farber Telephone Company
Fidelity Telephone Company
Goodman Telephone Company, Inc.
Granby Telephone Company
Grand River Mutual Telephone Corp.
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
Le-Ru Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
New London Telephone Company
Orchard Farm Telephone Company
Oregon Farmers Mutual Telephone Company
Ozark Telephone Company
Peace Valley Telephone Co., Inc.
Rock Port Telephone Company
Seneca Telephone Company
Steelville Telephone Company
Stoutland Telephone Company

Missouri Independent Telephone Company Group

Alma Communications Company d/b/a Alma Telephone Company
Chariton Valley Telephone Corporation
Choctaw Telephone Company
Mid-Missouri Telephone Company
MoKan Dial Inc.
Northeast Missouri Rural Telephone Company